The Law Commission

Working Paper No. 107

Transfer of Land

Implied Covenants for Title

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This working paper, completed on 27 April 1988, is circulated for comment and criticism only. It does not represent the final views of the Law Commission. The Law Commission would be grateful for comments before 30 November 1988.

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WORKING PAPER NO. 107

TRANSFER OF LAND
IMPLIED COVENANTS FOR TITLE

CONTENTS

		Paragraph	Page
Summary			v
Part I:	Introduction	1.1	1
Part II:	The Covenants	2.1	10
	As beneficial owner	2.2	10
	Leasehold property	2.3	12
	By way of mortgage	2.4	13
	Qualified covenants	2.5	14
	The four basic covenants	2.8	18
	Full power to convey	2.9	18
	Quiet enjoyment	2.11	20
	Freed from incumbrances	2.12	21
	Further assurance	2.14	23
	Conveyancing on the direction of another person	2.16	24
	Spouses	2.17	24
	"As settlor"	2.18	25
	"As trustee" etc.	2.19	25
	Limitation periods	2.20	26
	Actual capacity	2.21	28
	Contractual entitlement	2.22	30
	Subject-matter	2.23	31
	Knowledge	2.24	32

		Paragraph	Page
	Absolute in total	2.25	32
	Registered conveyancing	2.27	34
Part III:	**Options**	3.1	42
	A. No change	3.1	42
	B. Redraft	3.2	42
	C. Amend	3.3	43
	D. Abolish	3.9	47
	E. Statutory guarantee	3.11	48
	Failure of consideration	3.12	49
Part IV:	**Conclusion**	4.1	54
	Limitation periods	4.4	56
Appendix A:	**Sale of Goods Act 1979 s. 12**		
Appendix B:	**Law of Property Act 1925 s. 76, sch. 2**		
Appendix C:	**Land Registration Act 1925 ss. 24, 38(2), 69**		
	Land Registration Rules 1925 ss. 76, 77		

SUMMARY

In this working paper, the Law Commission examine, as part of their programme for the simplification and modernisation of conveyancing, the covenants for title usually entered into upon the sale or other disposition of land. The existing statutory covenants for title can be incorporated into a conveyance provided certain phrases are used and a specified capacity held, but the covenants are obscure, verbose and inadequate. There are also certain unjustifiable distinctions applying where title is registered. Five options are considered: to do nothing; to redraft the statutory covenants in modern language without other amendment; to redraft them with amendments; to repeal them without replacement; to repeal and replace them with a contractual term as to title similar to that implied on the sale of goods. The Commission tentatively prefers the last option.

All the opinions expressed in this paper are merely provisional. Its purpose is to obtain comments on them primarily from property practitioners and legal experts, but also from anyone else concerned with the transfer of land.

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THE LAW COMMISSION

ITEM IX OF THE FIRST PROGRAMME

TRANSFER OF LAND

IMPLIED COVENANTS FOR TITLE

PART I

INTRODUCTION

1.1 In the beginning, our original predecessors recommended that we ourselves should examine the system of conveying unregistered land with a view to its modernisation and simplification.[1] Within a year the then Lord Chancellor approved a recommendation extending the examination to cover registered conveyancing too.[2] A consultation process was then embarked upon to enable the consideration of certain listed subjects.[3] The last in that list was Implied Covenants.[4] Now, not before time, we turn our attention to one sort of implication in most conveyancing transactions,

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1. First Programme (1965), item IX. Law Com. No. 1.

2. See (1966) Law Com. No. 4 First Annual Report 1965-66, para. 70.

3. Ibid., para. 71.

4. Ibid.; the other subjects were: Root of Title; Restrictive Covenants; Local Land Charges; Purchasers' Inquiries; Land Charges; Vendors' Duty of Disclosure Affecting Title; and Standard Forms.

whether with registered or unregistered land, namely the covenants for title. These have been defined, without elaboration, as:

> The covenants entered into by a vendor in a conveyance of land on sale as to his title, giving the purchaser the right to an action for damages if the title subsequently proves to be bad.[5]

1.2 On a sale of goods, the seller generally guarantees his title. This means that there will always be implied terms that:

(a) he has a right to sell the goods;

(b) they are free from charges or incumbrances; and

(c) the buyer will enjoy undisturbed possession of them.

Of these, (a) and (b) may apply instead as at completion (i.e. where ownership is to pass at a later date than the contract for sale, then it is all right if the terms are satisfied by the later date). Further, (b) and (c) do not cover charges or incumbrances disclosed or known to the buyer. The seller may still sell only such title as he has, but even then he promises full disclosure of any known charges or incumbrances and also no disturbance by him or anyone claiming through him. All of this plus a bit more is achieved by one apparently modern and reasonably simply section: section 12 of the Sale of Goods Act 1979.[6] None

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5. Osborn's Concise Law Dictionary 7th ed.,(1983) by Roger Bird.

6. See Appendix A; the section was derived as redrafted from s. 1 of the Supply of Goods (Implied Terms) Act 1973 which replaced the much shorter and seemingly

of this can be excluded or restricted by the contract.[7]

1.3 On a sale of land, the vendor does not generally guarantee his title. To begin with, the position is complicated by the fact that different terms are implied in different ways into the contract and into the conveyance or transfer. First, the prima facie implication in a contract for the sale of land is that the vendor should show a good title.[8] This means essentially but technically that he will deliver appropriate documentary evidence to prove that he is entitled to and can convey the land in fee simple absolute in possession free from incumbrances.[9] The implication can be rebutted particularly by an adequate disclosure of any defects in the title.[10] A vendor of land may contract to sell only such title as he has but will still be assumed to have disclosed all that he ought, i.e. any known but latent defects in title.[11] So far, in substance, the title situation is the same as for a sale of goods save for not

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6. Continued
simpler s. 12 of the Sale of Goods Act 1893 essentially with extra provisions catering for the rare "such title" sale as recommended by us in Exemption Clauses in Contracts (1969), Law Com. No. 24.

7. See the Unfair Contract Terms Act 1977, s. 6, as amended by Sale of Goods Act 1979, Sched. 2.

8. Per Jessel M.R. in Lysaght v. Edwards [1876] 2 Ch. 499 at p. 507.

9. See further e.g. Emmet on Title 19th ed., Chapter 5, "Deduction and Investigation of Title".

10. See per Walton J. in Faruqi v. English Real Estate Ltd [1979] 1 W.L.R. 963; also Timmins v. Moreland Street Property Co. Ltd. [1958] Ch. 110 C.A. as to the effect of a purchaser's knowledge.

11. Re Haedicke and Lipski's Contract [1901] 2 Ch. 666; Becker v. Partridge [1966] 2 Q.B. 155.

yet being part of a statutory codification. But there are, inevitably, some significant distinctions.

1.4 It is not good enough for a vendor of land to say that he will have title by completion, i.e. when the property is due to pass: a purchaser need not wait, but may rescind the contract immediately and effectively on discovering his vendor's current lack of title.[12] However, with land, there is no statutory prohibition of the exclusion or restriction of the implied terms as to title; a vendor in breach of them will not yet be liable for substantial damages;[13] and in addition they appear to

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12. Per Megarry V.-C. in Pips (Leisure Productions) Ltd. v. Walton (1980) 260 E.G. 601 at p. 603.

13. But see (1987) Law Com. No.166 recommending abolition of the rule in Bain v. Fothergill. Note in particular para. 11 of that report:

> The point was also made that if the rule in Bain v. Fothergill were abolished an anomaly would arise in relation to the position before and after completion of the contract. Where a vendor conveys land for valuable consideration and is expressed to convey "as beneficial owner" certain covenants for title are implied into the conveyance by section 76 of the Law of Property Act 1925. Under these covenants for title, damages can only be recovered for defects in title created by the vendor himself or by a predecessor through whom he derives title otherwise than as a purchaser for value. Therefore, it is said, if the rule in Bain v. Fothergill were abolished, where there is a defect in title which has been created by a previous vendor, a purchaser would be able to recover substantial damages for that defect if discovered, as it should be through investigation, before completion, but could not sue in respect of that defect on the covenants for title after completion. However, the purchaser's inability to sue after completion in this situation stems from the limited obligation undertaken by the vendor under the implied covenants for title. Under our proposal, the purchaser's causes of action would remain unaltered; what would be different is his ability to claim substantial damages before completion. At the moment, the anomaly is greater as a result of the way in which

disappear by merger of contract into conveyance on completion.[14]

1.5 Secondly, in a conveyance of land there are really no straight-forward implications as to the vendor's title. Instead, certain statutory covenants for title are supposedly incorporated if specified phrases are used. Thus conventionally the operative part of a deed of conveyance will state that "the vendor as beneficial owner conveys to the purchaser ..." The three underlined words should incorporate by reference a statutory covenant containing over five hundred words. This now happens by virtue of section 76(1) of the Law of Property Act 1925 which itself

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13. Continued
the rule in Bain v. Fothergill has been applied by the courts. The rule does not apply where the purchaser is able to sue after completion on the covenants for title but can apply before completion even though the defect in title was created by the vendor. As a result, a purchaser who could have a cause of action either before or after completion in respect of a defect in title created by the vendor, may only be able to recover substantial damages once the contract has been completed. Before completion, if the defect had by then been discovered and the contract rescinded, he may be limited to recovering his conveyancing costs. This particular anomaly would disappear if the rule in Bain v. Fothergill were abolished. The parties to a conveyance can agree on wider covenants for title, but we are currently examining the covenants implied by statute in both registered and unregistered conveyancing. Consideration will inevitably be given to whether covenants for title should become absolute, when they would, in effect correspond with those implied into the contract for sale.

14. Knight Sugar Co. v. Alberta Railway and Irrigation Co. [1938] 1 All E.R. 266 at p.269. Merger is not an absolute doctrine but depends entirely upon the intention of the parties (see Barclays Bank Ltd. v. Beck [1952] 2 Q.B. 47). As Bowen L.J. has explained:

> It is true that the execution of the conveyance puts an end to all contractual obligations which are intended to be satisfied by the execution. But

cross-refers to Schedule 2 to the Act.[15] The result has been called "the nearest thing to a guarantee that the purchaser receives from the vendor."[16] But as such it is not only couched in "extremely difficult words",[17] a "jungle of verbiage",[18] but also quite inadequate. For an obvious example, a purchaser will not be protected where his vendor never had any title at all.[19] Nor will the purchaser be protected if his vendor was not actually a beneficial owner.[20] And there are various other difficulties of construction and operation which all together render the so called Implied Covenants for Title virtually worthless.[21]

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14. Continued

> that doctrine does not apply to cases where the contractual obligation is of such a kind that it cannot be supposed to have been the intention of all the parties that it should be extinguished by the conveyance.

(in Clarke v. Ramuz [1891] 2 Q.B. 456 at p. 461; see also Palmer v. Johnson (1884) 13 Q.B.D. 351 at p. 357). If covenants for title are neither implied nor expressed in the deed of conveyance, it may be arguable but appears never to have been argued that there is no merger as to title.

15. Both the section and Schedule are set out at length in Appendix B.

16. R.E. Megarry and H.W.R. Wade, The Law of Real Property 5th ed., (1984) p. 159.

17. Per Harman J. in Pilkington v. Wood [1953] Ch. 770 at p. 777.

18. Per Slade L.J. in Meek v. Clarke (1977) C.A. unreported transcript p. 16B, see also Megarry and Wade at p. 163, n. 56: "The language of the covenant ... is clumsy and obscure".

19. See David v. Sabin [1893] 1 Ch. 523; also Megarry and Wade pp. 164-5 instancing a squatter selling.

20. S. 76(1)(A) only operates if the vendor "conveys and (sic) is expressed to convey as beneficial owner". See further para. 2.21.

21. See further and better particulars in Pt. II.

1.6 These criticisms were recently recognised as "notorious" by the Government's Conveyancing Committee in its Second Report[22] and the suggestion was made:

> As to s. 76, it might appear desirable to replace this section and the covenants for title implied in obscure language by Schedule 2 of the 1925 Act with a statutorily implied term in contracts for the sale of land as to the vendor's title which term would be absolute and would not merge on completion and so would remain unarguably enforceable, in particular by the Chief Land Registrar under s. 83(10) of the Land Registration Act 1925.[23]

However, the purpose of this paper is not simply to promote this or any other particular suggestion, but to enable examination of existing difficulties and possible solutions. These solutions will range from merely redrafting the present provisions in modern language - clarification with or without minor amendments[24] - to adopting instead a new enactment in substantially the same terms as that applying to sale of goods.[25] Also no doubt to be considered is the

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22. (1985), para. 7.8.

23. Ibid., para. 7.9; the L.R.A. 1925, s. 83 generally confers a right to indemnity for loss because of rectification of the register; subs. (10) provides "the Registrar shall be entitled to enforce, on behalf of the Crown, any express or implied covenant or other right which the person who is indemnified would have been entitled to enforce in relation to the matter in respect of which indemnity has been paid".

24. E.g. the flaw in the formula mentioned in the previous paragraph could be cured by substituting "or" for "and" as suggested in Megarry and Wade, p. 160 n. 34, so that it read "conveys or is expressed to convey" but then presumably no particular words at all would be needed in the conveyance for there to be statutory implications.

25. I.e. Sale of Goods Act 1979, s. 12: curiously the L.P.A. 1925, s. 76 nowhere confines its operation to conveyances of land or even to deeds of conveyance, so that it would seem potentially applicable to any

possibility of leaving the statutory provisions untouched. This "sleeping dogs" approach may well commend itself to practitioners reluctant to grapple with changes in law or practice not least because their own present position seems superficially secure: not only are the implied covenants deemed proper but solicitors are not to be liable in any way for failure in good faith to negative or replace them.[26] Against this, however, a solicitor who has negligently investigated title cannot compel the client-purchaser to mitigate his damages by pursuing his alternative remedy under the implied covenants for title.[27] Nevertheless, the paramount concern of most must surely be the welfare of their conveyancing clients: the protection provided for purchasers should be sufficient whilst the liability imposed on vendors should not be excessive. Although the caveat emptor rule does not apply ordinarily to defective titles,[28] there will normally be an investigation of the vendor's title by or on behalf of the purchaser. This investigation cannot be relied upon as necessarily revealing every defect in the title. Apart from the asserted complexities of land

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25. Continued
contract in writing for the sale of goods (or any other property) which happens to use the magic words "as beneficial owner".

26. L.P.A. 1925, s. 182(1) (now extended to licensed conveyancers: A.J.A. 1985).

27. See per Harman J. in Pilkington v. Wood [1953] Ch. 770 at p. 777:

> I am of the opinion that the so-called duty to mitigate does not go so far as to oblige the injured party, even under an indemnity, to embark on a complicated and difficult piece of litigation against a third party ... It is no part of the plaintiff's duty to embark on the proposed litigation in order to protect his solicitor from the consequences of his own carelessness.

28. As to a vendor's duties of disclosure in respect of latent defects in title, see Emmet on Title 19th ed., Chapter 4, part 3.

law,[29] there is the prohibition of searching requisitions,[30] coupled with the pervasive problems anyway of proving negatives. The covenants for title purport to provide a protection which is the logical corollary to these limitations. As Russell L.J. once put it: "Conveyancing is conducted generally on a basis of good faith with something of a long stop in the shape of covenants for title".[31] For this position, a safe fielder should surely be selected.

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29. Compare per Balcombe L.J. in Sharneyford Supplies Ltd. v. Edge [1987] 2 W.L.R. 363 C.A. at p. 371g as to the difficulties of making title to land under English Law no longer being a valid rationale for the rule in Bain y. Fothergill.

30. See Re Ford and Hill (1879) 10 Ch. D. 365 where the Court of Appeal held that the vendor was not bound to answer such a searching interrogation as: "Is there to the knowledge of the vendors or their solicitors any settlement, deed, fact, ommission, or any incumbrance affecting the property not disclosed by the abstract?"

31. In Hodgson v. Marks [1971] Ch. 892 at p. 932.

PART II

THE COVENANTS

2.1 Long ago, it became customary to express in a deed of conveyance a warranty or covenant for title, to provide a purchaser with contractual protection against a defect in title subsequently appearing. The practice was for elaborate covenants for title to be set out at great length, and well before the nineteenth century standard forms had become settled. Then, with the object of shortening conveyances it was provided by section 7 of the Conveyancing Act 1881 that the use of certain terse expressions should, in effect, save the trouble until then expended in fully setting out the covenants. This trouble was saved because the use of the appropriate expression simply incorporated into the conveyance covenants for title in the settled standard forms. Section 7 of the Act of 1881 has now been replaced (with slight amendments) by section 76 of the Law of Property Act 1925, and the result is that conveyancers still use the nineteenth century standard forms of covenants now set out in Schedule 2 to the latter Act. Therefore, not only are the implied covenants for title difficult to comprehend, but many old cases decided on express covenants are applicable.[1]

2.2 As beneficial owner - The most convenient order in which to discuss the covenants for title is to take in turn those implied by each of the specified expressions of

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1. See much further M.J. Russell (1962) 26 Conv. (N.S.) 45.

capacity, starting with the expression "as beneficial owner", since this implies the maximum number of covenants.[2] By virtue of paragraph (A) of section 76(1) of the Law of Property Act 1925 there is deemed to be included in a conveyance for valuable consideration[3] (other than a mortgage) "a covenant (sic) by a person who conveys and is expressed to convey as beneficial owner". The terms of this covenant are set out in Part I of Schedule 2 to the Act and for the purposes of comprehension may be paraphrased, in essence, as the following four covenants:

(1) That the grantor has (with the concurrence of any person conveying by his direction) full power to convey the subject-matter as expressed.

(2) That such subject-matter shall be quietly enjoyed by the grantee without any lawful disturbance.

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2. See also Law of Property (Joint Tenants) Act 1964, s. 1(1):

> the survivor of two or more joint tenants shall, in favour of a purchaser of the legal estate, be deemed to be solely and beneficially interested if he conveys as beneficial owner or the conveyance includes a statement that he is so interested.

This provision was designed to protect purchasers from such survivors from the risk of secret severances in equity preventing beneficial survivorship. Thus the expression of capacity serves two purposes, although oddly if there has been a severance the covenants for title may not help the purchaser at all because his vendor will still be a trustee and not the beneficial owner (see para. 2.21). The 1964 Act does not apply to registered land; so no protection is provided against beneficiaries with overriding interests.

3. Here "valuable consideration" includes marriage but does not include a nominal consideration in money: L.P.A. 1925, s. 205(1)(xxi). See also Johnesy Estates Ltd. v. Lewis & Manley (Engineering) Ltd. (1987) 54 P. & C.R. 296 C.A. as to the assumption of obligations under a lease on the part of an assignee constituting valuable

(3) That such subject-matter shall be received by the grantee freed from or indemnified against all incumbrances.

(4) That the grantor will do anything reasonably requested in order further or more perfectly to assure (or convey) such subject-matter to the grantee.

2.3 Leasehold property - If the conveyance happens to be an assignment of leasehold property (but is otherwise the same as before), then by paragraph (B) of section 76(1), a further covenant is implied in the terms of Part II of Schedule 2 to the Act, which again may be resolved, in essence, into the following two covenants:

(5) That the lease is valid and subsisting.

(6) That the rent reserved by and the covenants contained in the lease have been paid, observed and performed.

These further covenants are necessary on account both of the restrictions on the investigation of title to leaseholds,[4]

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3. Continued consideration for the purposes of s. 77 of the L.P.A. 1925 despite the fact that the assignment was stated to be "in consideration of the sum of £1.00". See also per Lord Wilberforce in Midland Bank Trust Co. Ltd. v. Green [1981] A.C. 513 H.L. at p. 532 in relation to the Land Charges Act 1972, s. 4(6), rejecting the proposition that a conveyance at gross undervalue had been for a nominal consideration. Compare Sched. II to the L.P.A. 1925 where, in the covenants themselves "a purchase for value shall not be deemed to include a conveyance in consideration of marriage".

4. See L.P.A. 1925, s. 44(2), (3), (4) and (11).

and of the assumption following from production of the receipt for the last payment due for rent.[5] The mutual indemnity covenants implied by section 77 of the Law of Property Act 1925 and section 24 of the Land Registration Act 1925[6] in conveyances and transfers of land subject to rents, not being covenants for title, are outside this exercise. It should be appreciated that the six covenants for title are given by virtue of section 76 only by the assignor on the sale of an existing lease, and not by the lessor on the grant of a new lease unless in consideration only of a premium.[7] However, it will also be appreciated that the relationship of lessor and lessee at common law automatically implies on the part of the former a covenant for quiet enjoyment.[8]

2.4 By way of mortgage - If the conveyance happens to be by way of mortgage or charge (but is otherwise the same as before, i.e. "as beneficial owner"; nothing is implied by "as mortgagor"), then by paragraphs (C) and (D) of section 76(1) the covenants in the terms set out in Parts III and IV of Schedule 2 to the Act are implied.[9] Although these covenants are substantially the same as covenants (1) to (6) above, there are four differences obviously attributable to the nature of the transaction concerned. First, covenant (2) - for quiet enjoyment - only arises on the mortgagee taking possession after a default by the mortgagor in paying principal or interest. Second, so long

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5. See L.P.A. 1925, s. 45(2), (3) and (10).

6. See the Land Registration Rules 1925, r. 109.

7. See L.P.A. 1925, ss. 76(5) and 205(1)(xxiii).

8. See an article by M.J. Russell at (1978) Conv. 418-31.

9. See Mornington Permanent B.S. v. Kenway [1953] Ch. 382 at p. 386.

only as the mortgagor's equity of redemption subsists, performance of covenant (4) - for further assurance - is to be at the cost of the mortgagor-covenantor. Normally performance of this covenant is to be at the cost of the covenantee, the person requesting its performance. Third, in a mortgage of leasehold property, there is implied an additional covenant:

(7) That the rent reserved by and the covenants in the lease will, so long as any money remains owing on the security of the mortgage, be paid, observed and performed.

Fourth and most important, all the covenants are in terms absolute and not qualified as they are in any other conveyance to the extent and in the manner considered in the next three paragraphs.

2.5 Qualified covenants - Although the benefit of the implied covenants for title may be said to run with the land,[10] the only person who can be sued for damages in respect of a breach of any of the covenants given above is the grantor, as the covenantor. However, the covenantor's liability in damages is not absolute (except in the case of a mortgage), but is qualified to extend only to a breach of the covenants caused by the acts or omissions of any of the following persons:

(a) the covenantor;

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10. See L.P.A. 1925, s. 76(6).

(b) anyone "through whom he [the covenantor] derives title" otherwise than by purchase for value;[11]

(c) any person conveying by the covenantor's direction or "claiming by, through or under" either the covenantor or a person within (b); and

(d) any person claiming (sic) in trust for the covenantor.[12]

As Lawton L.J. not so long ago remarked:[13]

> It came as a surprise to me as a common lawyer that the statutory covenants set out in Part I of the Second Schedule to the Law of Property Act 1925 in so far as it deals with power to convey and quiet enjoyment is not the conveyancing equivalent of the mercantile warranty of title. It is a qualified

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11. It is expressly stated in Pts. I and II of Sched. 2 that "in the above covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage". This is contrary to the general provision of the L.P.A. 1925, s. 205(1)(xxi) applying to s. 76 itself, that valuable consideration does include marriage. See n. 3.

12. See per Lindley L.J. in David v. Sabin [1893] 1 Ch. 523 at p. 532, for this list. Reference to the actual wording of the covenant in Pt. I of Sched. 2 (see Appendix B) may give rise to difficulties over the sense of the word "notwithstanding". It appears, for example, in covenant (1) - full power to convey - in the following context: "That, notwithstanding anything by (the grantor) done ... or omitted ... (the grantor) has full power to convey." This is somewhat ambiguous, and the suggestion in Megarry and Wade, The Law of Real Property 5th ed., p. 164, n. 64, that here "notwithstanding" is used in the sense of "to the extent of" does not seem to clarify. It is thought that the answer is to read the covenant throughout not as positive but as negative, as follows: That nothing has been done or omitted by the grantor to cause the grantor not to have full power to convey.

13. In Meek v. Clarke (1977) C.A. unreported transcript pp. 23-4.

> statutory covenant, first introduced into conveyancing by the Conveyancing Act 1881, which is in the same terms as the present statutory covenant, and reflected the ordinary course of business in sales of land and the practices of conveyancers before the date ... It follows that this conveyancing background must be borne in mind when construing the statutory covenant.

Of course, conveyancing practice is not what it used to be but the qualifications still stand.

2.6 As a consequence perhaps of nineteenth century drafting, the word "through" appears to have a different meaning in each of the two phrases quoted respectively in (b) - "through whom he derives title" - and (c) - "claiming by, through or under" the covenantor of the qualification list above. In (b) it covers predecessors in title in fee simple (assuming this to be the subject-matter) whilst in (c) it does not cover successors in title in fee simple but only persons with derivative interests such as lessees or mortgagees. Three examples may explain this: First, if Tom allows the acquisition of an easement by prescription and then gives the fee simple to Dick who as beneficial owner sells it to Harry, then Dick will be liable for Tom's omission to prevent the easement, Tom being a predecessor in title in fee simple (Tom will not be liable to anyone because he will have given no covenants for title). Second, if Dick sells his land in fee simple, to Tom, who resells to Dick, having in the meantime granted a sub-lease which he conceals, and Dick as beneficial owner, afterwards sells the fee simple to Harry, then Dick will not be liable to Harry for Tom's act, although Tom was a person claiming through Dick. Third, if Dick grants a lease of his land to Tom, who

surrenders the lease to Dick, having in the meantime granted a sub-lease which he conceals, and Dick afterwards sells the fee simple to Harry as beneficial owner, then Dick will be liable to Harry for the act of Tom, a person claiming a derivative interest through Dick.[14]

2.7 A plaintiff bringing an action for breach of the covenants for title must show an act or omission by a person mentioned in the list (a) to (d) in paragraph 2.5. Therefore, if the precise origin of the defect in title cannot be established, then no one can be made liable under the covenants. An interesting example is provided by the facts in Stoney v. Eastbourne Rural District Council.[15] Some time after the Duke of Devonshire, as beneficial owner, had sold a farm in fee simple to the plaintiff, an undisclosed public right of way over the farm was established. Title to the farm had been vested in persons through whom the Duke derived title otherwise than for value since 1782. In other words, that was the date of the last conveyance for valuable consideration, the farm having remained in the Duke's family until the sale to the plaintiff. Therefore, to render the Duke liable on the covenants, the plaintiff had to show that the right of way was dedicated after 1782, whilst to avoid liability the Duke had to show a dedication before 1782. Neither could be sufficiently shown. The Court of Appeal decided that the words "otherwise than by purchase for value" were not an exception from but part of the covenant, so that the burden of proof was not on the Duke to show that he was within an exception but was on the plaintiff, and the action

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14. Of these examples, the second is based on an example given by Romer J. and approved by A.L. Smith L.J. in the leading case of David v. Sabin [1893] 1 Ch. 523 (at pp. 530 and 544, respectively), and the third is based on the facts of that case.

15. [1927] 1 Ch. 367.

accordingly failed. A comparable decision had earlier been reached by the Court of Appeal in Howard v. Maitland[16] where in the absence of evidence no inference had been taken that a grant of a right of common must have been by a predecessor in title of the plaintiff, these words not extending to "every person in possession of this property since the foundation of the world".[17]

2.8 The four basic covenants - After outlining the statutory covenants for title which may be implied by a vendor conveying "as beneficial owner", and how these covenants are qualified, certain aspects of each of the four basic covenants (implied when the property conveyed is not leasehold) will be considered.[18]

2.9 Full power to convey - This covenant will be broken if the property conveyed is found to be subject to any defect in title not expressly excepted from the conveyance, provided that the defect was caused by a person within the qualification of the covenant. This proviso involves a major restriction, namely, that the vendor does not covenant that he has any title but only that the title has not been made defective by the acts or omissions of either himself or the persons through whom he derives title otherwise than for value. In other words, the vendor or such predecessors in title must once have had the title; the covenant does not provide a purchaser with a remedy on eviction by title paramount. For example, if a squatter who has not acquired a title by adverse possession sells the fee simple in land

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16. (1883) 11 Q.B.D. 695.

17. Per Lindley L.J. at p. 703.

18. See also M.J. Russell at (1970) 34 Conv. (N.S.) 178.

as beneficial owner, and the purchaser is later evicted by the proper owner, then the squatter will not be liable under this covenant. This aspect did not commend itself to a former editor of the Conveyancer and Property Lawyer, who complained:

> A purchaser's position would undoubtedly be more secure if every vendor gave unqualified covenants for title. If a vendor sells a Rolls-Royce that does not belong to him, the purchaser on being dispossessed can get his money back ... why should the position be different if the vendor sells a labourer's cottage?[19]

An explanation appears to lie in the established approach that a vendor of land, unlike a vendor of goods, cannot be expected to have any confidence that his title is good. One consequence of this according to Erle C.J.[20] was that:

> Upon a sale of real property it is for the purchaser to ascertain what the title of the vendor is, and to satisfy himself that he has a good title. The vendor then makes a conveyance and usually covenants that he has done no act to affect or derogate from his title. If the vendor has no title at all to the property conveyed, there would be no breach of such a covenant.

However, given the substantial reforms effected by the 1925 property legislation as well as the wide spread of registration of title, this explanation may no longer be thought convincing.[21]

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19. At (1964) vol. 28, p. 188. See also Rowland v. Divall [1923] 2 K.B. 500 and paras. 3.12-3.13.

20. In Thackeray v. Wood (1865) 6 B. & S. 766.

21. Cp. (1987) Law Com. No. 166 as to rule in Bain v. Fothergill.

2.10 With the above may be contrasted the position where the vendor (or one of the predecessors in title for whom he is responsible) originally had title to all the land sold but has since allowed a squatter to obtain a title to some or all of it by adverse possession. That this is an omission for which the vendor will be liable under the covenants if he purports to convey all the land has been decided by the House of Lords.[22]

2.11 Quiet enjoyment - The covenant for quiet enjoyment without lawful disturbance is more frequently encountered when implied automatically at common law by the landlord and tenant relationship. Four points may be briefly made. First, it will be appreciated that quiet enjoyment involves absence not of noise[23] but of physical disturbance.[24] Second, for there to be a breach of the covenant the disturbance has also to be lawful. This is not a contradiction; if the disturbance is unlawful, remedies in tort are available.[25] Third, the question arises whether a breach of this covenant can be caused by the activities of

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22. In Eastwood v. Ashton [1915] A.C. 900. For the suggestion that the covering of omissions by the covenants for title was historically a mistake, due to the inadvertent dropping of an initial "c", read M.J. Russell at (1967) 31 Conv. (N.S.) 268 et seq; an interesting problem which could arise where a period of adverse possession or of prescription has stretched over more than one ownership, perhaps with uncertainty as to when it began and as to which covenantor omitted to stop it running at the eleventh hour, is considered by A.M. Prichard at (1964) 28 Conv. (N.S.) 206, n. 6.

23. See Jenkins v. Jackson (1888) 40 Ch. D. 7.

24. See Howard v. Maitland (1883) 11 Q.B.D. 695, which held: on breach of the covenant where there had been a judicial decree, that land was subject to a right of common but no entry in pursuance thereof.

25. See Malzy v. Eicholz [1916] 2 K.B. 308.

the vendor on adjoining land, e.g. interfering with the access of light to the purchaser's land. The position appears to be that, on the one hand, if the adjoining land was acquired by the vendor after the conveyance in which the covenant is implied, then there can be no breach of the covenant, on the ground that to hold otherwise would be to enlarge the original grant.[26] On the other hand, if the vendor owned the adjoining land at the time of the conveyance, then the answer would really depend upon whether the activities amount to a derogation from the original grant rather than a breach of this covenant.[27] Fourth, again this covenant provides a purchaser with no remedy in the case of a vendor (or any predecessor for whom he is responsible) who has never had any title, since it does not cover eviction by title paramount.[28]

2.12 Freed from incumbrances - This present covenant, embodied in the second paragraph of the full covenant, has no main verb.[29] The paragraph begins: "And that, freed and discharged ..." and continues with this sub-clause right to the end of the paragraph. It seems that the paragraph can only be construed by repeating in it the main verb from the preceding covenant (2), so that it would, in substance, read as follows: "And that [the subject-matter shall be quietly enjoyed by the purchaser] freed and discharged ..." In other words, although often treated as an independent covenant, covenant (3) is really no more than part of

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26. Davis v. Town Properties Investment Corporation Ltd. [1903] 1 Ch. 797.

27. See Harmer v. Jumil (Nigeria) Tin Areas [1921] 1 Ch. 200: cf. Port v. Griffith [1938] 1 All E.R. 295 at p. 298.

28. See Baynes & Co. v. Lloyd & Sons [1895] 2 Q.B. 610.

29. See Appendix B.

covenant (2). The significance of this is that the covenant can be seen to be not that the land is free from incumbrances, but rather for indemnity in the event of any incumbrance actually being enforced. This is thought to be the correct view but it is contradicted by the promotion by Joyce J. of the subsidiary verbs "freed and discharged ..." to main verbs.[30]

2.13 The vendor only covenants to indemnify the purchaser in respect of incumbrances due to the acts or omissions of the qualified list of persons mentioned earlier. An illustration which, though turning on unusual facts, is of general application occurred in Chivers & Sons Ltd. v. Air Ministry, Queens' College, Cambridge, third parties.[31] There as a part of the transaction for value by which the vendor had acquired the land (in 1834 by exchange under the Inclosure Act 1833), a liability (for chancel repairs) had been imposed on the owner of the land for the time being. Wynn-Parry J. held that, since the liability was imposed by a combination of the common law and statute, there was no act or omission for which the vendor was responsible, so that the purchaser had no remedy under the covenant. Contrast Stock v. Meakin[32] where a vendor was held liable to indemnify a purchaser in respect of a statutory charge on the land (the expenses of private street works), which he could not have prevented from arising, on the ground that he had omitted to discharge it.

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30. In Turner v. Moon [1901] 2 Ch. 825 at p. 828; see also M.J. Russell at (1970) 34 Conv. (N.S.) 187-8, although the authorities there cited tend to support the above view, as also does Thompson v. Thompson (1871) I.R. 6 Eq. 113 cited by C.K. Liddle at (1979) Conv. 93-6.

31. [1955] Ch. 585.

32. [1900] 1 Ch. 683.

2.14 Further assurance - In form this covenant is that the vendor and any of the qualified list of persons for whom he is responsible will at all times execute and do anything reasonably requested in order to perfect the conveyance.[33] However, the only person who is bound by and can be sued under the covenant is the vendor. Therefore, so far as compliance with the request is within the vendor's own power, the remedy for breach of the covenant will be an order for specific performance; otherwise as with the other covenants it will be an award of damages for non-compliance. The costs of any further assurance are expressly to be borne by the person making the request.[34]

2.15 Under this covenant, the vendor can be compelled to convey to the purchaser (or the successor in title making the request) any outstanding estate or interest necessary to give effect[35] to the conveyance, even if that estate or interest was later acquired for valuable consideration.[36] A common illustration of the operation of the covenant used to be the request that an entail be barred where an owner of a base fee had purported to convey the fee simple.[37] A more practical illustration, although not common under this covenant, is the request that the Settled Land Act

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33. An example of a deed of further assurance is provided by Form No. 7 in Sched. 5 to the L.P.A. 1925.

34. Unless the conveyance was by way of mortgage and the equity of redemption still subsists.

35. And no more: Re Repington, Wodehouse v. Scobell [1904] 1 Ch. 811.

36. Otter v. Vaux (1856) 26 L.J. Ch. 128.

37. See Bankes v. Small (1887) 34 Ch. D. 415 affirmed in the Court of Appeal (1887); 36 Ch. D. 716.

conveyancing machinery be complied with or that an outstanding mortgage or charge be discharged.[38]

2.16 Conveyancing on the direction of another person - If a person conveys on the direction of another person and that other person is in the conveyance expressed to direct as beneficial owner, then the same covenants for title are implied as if that other person had himself conveyed and been expressed to convey as beneficial owner.[39] The most useful example of the operation of this should occur in the case of a sub-sale without an intermediate conveyance. However, whether the sub-purchaser is entitled to insist on either form so far as the vendor is concerned is open to doubt. As against the sub-purchaser, the vendor is merely a bare trustee for the purchaser and not a beneficial owner.

2.17 Spouses - If a husband and wife both convey as beneficial owners, then in addition to the normal covenants there are implied on the part of the husband, first, covenants as if he directed the wife to convey (see the preceding paragraph), and second, covenants in the same terms as those implied on the part of the wife.[40] For example, the husband would be liable for a breach of covenant (1) - full power to convey - if the wife were an infant.[41] Normally, however, being necessarily trustees of the legal estate for themselves[42] they would convey "as

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38. See per North J. in Re Jones, Farrington v. Forrester [1893] 2 Ch. 461 at p. 471.

39. L.P.A. 1925, s. 76(2).

40. L.P.A. 1925, s. 76(3).

41. Nash v. Ashton (1682) T. Jones 195.

42. See L.P.A. 1925, ss. 34-6.

trustees" (see below).

2.18 "As settlor" - There is implied in a conveyance by way of settlement by a person who conveys and is expressed to convey as settlor only, covenant (4) above - for further assurance.[43] Valuable consideration is not made a requisite for the implication of the covenant and the covenant is qualified much further even than is the covenant when a beneficial owner conveys; a settlor only gives the covenant for himself and the person subsequently deriving title under him. Nevertheless, the covenant may involve not only conveying an interest acquired later for valuable consideration[44] but also discharging outstanding incumbrances.[45] Accordingly, it may be difficult to understand why a voluntary settlor should give any covenant for title at all.

2.19 "As trustee" etc. - Where a person conveys (whether or nor for value) and is expressed to convey as trustee, mortgagee, personal representative, or under an order of the court, then only one covenant is implied.[46] This covenant is, in effect, that the person so conveying has not personally created any defect in title, i.e. that he has not himself incumbered the land. No liability attaches where

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43. S. 76(1)(E) of, and Pt. V of Sched. 2 to, the L.P.A. 1925.

44. Otter v. Vaux (1856) 26 L.J. Ch. 128.

45. See per North J. in Re Jones, Farrington v. Forrester [1893] 2 Ch. 461 at p. 471; and per Chitty L.J. in West v. Williams [1899] 1 Ch. 132 at p. 147.

46. S. 76(1)(F) of, and Sched. 2, Pt. VI to, the L.P.A. 1925 as amended by the Mental Health Act 1959, Sched. 8, Pt. 1.

there has not been active participation in the creation of the incumbrance, mere notice being insufficient.[47] Although, as compared with the covenants implied into a conveyance "as beneficial owner" the protection here provided for a purchaser is much less, the purchaser is not entitled where trustees are selling in exercise of a trust for sale to insist on having the beneficiaries joined to give the full covenants for title.[48] This may well be thought unjust where, as with the common example of dwelling houses owned by husband and wife, the trustees are themselves the sole beneficiaries.

2.20 Limitation periods - It will be apparent from the earlier consideration of the terms of each of the various covenants for title that they may overlap. For example, if a still outstanding mortgage had been created by a vendor of land before conveying the fee simple as beneficial owner and afterwards enforced, the purchaser in the meantime having unsuccessfully requested its discharge, then there will be a breach of all four of the vendor's implied covenants. In such a case the purchaser's choice of which covenant to pursue may, when appropriate, be governed by lapse of time. The length of the limitation period for all the covenants, assuming the normal case of a conveyance of an interest in land under seal,[49] is twelve years, and otherwise six years, in the absence of any extensions.[50] However, the period can run from a different date for each of the covenants, so that one or more may be statute-barred. Taking the mortgage

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47. Woodhouse v. Jenkins (1832) 9 Bing. 431.

48. Cottrell v. Cottrell (1866) L.R. 2 Eq. 330.

49. See L.P.A. 1925, s. 52.

50. Limitation Act 1980, ss. 2 and 8.

example, the covenants are breached and time begins to run as follows:

(1) The covenant that the vendor has full power to convey will be broken by the mere existence of the mortgage as at the date of the conveyance.[51]

(2) The covenant for quiet enjoyment is not broken until the lawful disturbance - the enforcement of the mortgage - actually occurs, which may be years later.[52]

(3) If the covenant for freedom from incumbrances is merely a subsidiary of the covenant for quiet enjoyment, then the breach will occur as in (2). However, it was held by Joyce J. in Turner v. Moon[53] that, like the covenant of having full power to convey, the covenant for freedom from incumbrances is broken, if at all, as at the date of the conveyance and time runs from that date.[54]

(4) The covenant for further assurance is broken when a request to execute or do anything under the

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51. Spoor v. Green (1874) L.R. 9 Ex. 99 at p. 110.

52. In Spoor v. Green Bramwell B. (loc. cit. at p. 111) also added the distinction that the first covenant of full power to convey can only be broken or not broken once and for all at the date of the conveyance, whilst the second covenant for quiet enjoyment will be broken anew by each and every disturbance.

53. [1901] 2 Ch. 825.

54. See also per Harman J. in Pilkington v. Wood [1953] Ch. 770 at p. 777 but cp. Neville J. in Nottidge v. Dering [1909] 2 Ch. 647 at p. 656. (affirmed by the C.A. at [1910] Ch. 297) concerning a similarly worded express covenant, that there must be acutal interruption of enjoyment to justify action.

covenant - to discharge the mortgage - has been both made and refused.[55]

2.21 Actual capacity - Only on the part of a person "who conveys and is expressed to convey" in one of the specified capacities are the various covenants for title implied.[56]

Accordingly, as observed in Megarry and Wade:[57]

> The conveyance must therefore state in terms that he [i.e. the vendor] conveys "as beneficial owner". It has been held that the inept statutory formula requires in addition that the vendor should in fact be a beneficial owner. This would deprive the purchaser of the protection of the covenants in exactly the case where he ought to have it, namely, where the vendor's title is not as represented, e.g. where the vendor is not a beneficial owner but a trustee. The object of the Act is to allow short forms of words to take the place of the lengthy covenants which used to be set out in full; and the Act becomes a trap unless the covenants are uniformly implied whenever the statutory forms of words are used.

The purpose of section 76 was to shorten deeds of conveyance by obviating the setting out in full of express covenants for title. The actual capacity of the covenantor would be irrelevant if the covenants were set out in full and it should follow, since no alteration of the law was intended, that the position is the same under section 76. In other words, the phrase "conveys and is expressed to convey" should be construed as "expressly purports to convey". Nevertheless, the phrase quoted has given rise to contrary

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55. Jones v. King (1815) 4 M. & S. 188.

56. L.P.A. 1925, s. 76(1), emphasis supplied; cp. s. 77(1)B(ii), D(ii) and 4 where is said "who conveys or is expressed to convey".

57. At p. 160.

judicial views. Clauson L.J. in Fay v. Wilkins & Co.[58] said in relation to the expression "as personal representative":

> It must, however, be borne in mind that the implication of covenants by a conveyance in that form is effective only if the conveying party is not only expressed so to convey, but in fact does convey as personal representative.

In the same case, Lord Greene M.R. had already[59] uttered the same view, which was later cited as authority by Harman J.[60] for saying "... it being a sine qua non that the covenantor must be in fact, as well as being expressed to be, the beneficial owner". Since then Megarry J. also has indicated unqualified acceptance of this view.[61] Against this, not only do these views conflict with the purpose of section 76, but also with what was the existing trend of more direct authority. Thus, the covenants for title had been implied where a tenant for life (a trustee) was expressed to convey "as beneficial owner",[62] where trustees were expressed to convey "as personal representatives"[63] and where personal representatives were expressed to convey "as beneficial owners".[64] Consequently there may still be some uncertainty.

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58. [1941] Ch. 360 at p. 366.

59. At p. 363.

60. In Pilkington v. Wood [1953] Ch. 770 at p. 777.

61. In Re Robertson's Application [1969] 1 W.L.R. 109 at p. 112.

62. David v. Sabin [1893] 1 Ch. 523 and Re Ray [1896] 1 Ch. 468, see per Kay L.J. at p. 475.

63. Wise v. Whitburn [1924] 1 Ch. 460.

64. Parker v. Judkin [1931] 1 Ch. 475.

2.22 Contractual entitlement - A purchaser is entitled to have the vendor enter, in the conveyance, into the covenants for title appropriate to the capacity in which the vendor contracted to sell, but not more than such covenants.[65] Where there is no contract, there is no entitlement to any covenants for title, although some grantors may be willing to give some, whilst some grantees (especially mortgagees) may be able to insist on having some. Further, a provision in the contract may entitle the vendor to exclude the covenants for title from, or modify them in, the conveyance. The covenants may be excluded by simple omission: if the grantor is not expressed to convey in one of the specified capacities, then no covenants for title on his part are implied.[66] Again, it is expressly provided[67] that the covenants may be varied or extended, but only by deed or assent, and will then operate exactly as if implied by the section. A common but not obvious example of a vendor's right to modify the covenants for title occurs on the sale of leaseholds. Usually the contract will provide that the purchaser shall take the property "as it is" or "as it stands". In such a case the vendor is entitled to modify covenant (6) in paragraph 2.3, i.e. that the covenants contained in the lease have been observed and performed, in order to exclude his liability to the purchaser for any breaches of repairing covenants.[68] A modification of the covenants for title must not go so far as to destroy liability altogether: if it does, it will be repugnant and

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65. Worley v. Frampton (1846) 5 Hare 560.

66. L.P.A. 1925, s. 76(4).

67. S. 76(7).

68. Butler v. Mountview Estates Ltd. [1951] 2 K.B. 563 and see now condition 11(7) of the National Conditions of Sale (20th ed.) and condition 8(5) of The Law Society's Conditions of Sale 1984.

void.[69] Also if the covenants for title implied in the conveyance do not conform to the parties' entitlement under the contract, there can be rectification.[70]

2.23 Subject-matter - A trap is caused by the fact that the covenants for title are only implied into a conveyance "as far as regards the subject-matter ... expressed to be conveyed".[71] It follows from this that, when a vendor in terms conveys only such title as he has, the purchaser takes it for better or for worse and cannot complain under the covenants for title when he later discovers that the title the vendor had was defective.[72] The purchaser will be similarly unprotected if the vendor simply conveys freehold land without any words of limitation, e.g. by omitting to add "in fee simple". In such a case the conveyance operates to pass to the purchaser "the fee simple or other the whole interest which the grantor had power to convey in such land".[73] If it later turns out that the vendor had no power to convey the fee simple or indeed any interest in the land,

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69. See Watling v. Lewis [1911] 1 Ch. 414.

70. Strait v. Fenner [1912] 2 Ch. 504 and Butler v. Mountview Estates Ltd. ante.

71. L.P.A. 1925, s. 76(1).

72. See May v. Platt [1900] 1 Ch. 616 (where with this object it was unsuccessfully claimed that a conveyance should be rectified by the insertion of "if any" after "all the estate term and interest") and Smith v. Osborne (1857) 6 H.L.C. 375 (see also Fowler v. Willis [1922] 2 Ch. 514 and in George Wimpey & Co. v. Sohn [1967] Ch. 487, per Harman L.J. at p. 505 and per Russell L.J. at p. 509.

73. L.P.A. 1925, s. 60(1).

then again there can be no liability under the covenants for title.[74]

2.24 Knowledge - There can be no breach of the covenants for title in respect of any incumbrance or other defect to which the conveyance is expressly made subject. However, the covenants do cover incumbrances and defects fully known to the purchaser at the time of the conveyance, even covering those appearing by recital on the face of the conveyance:[75] compare the rule for contracts that a purchaser who knows of an irremovable defect in title cannot therefore refuse to complete.[76]

2.25 Absolute in total - Although the burden is personal to the covenantor and also extends only to the acts and omissions of a qualified list of persons, the benefit of the covenants runs with the land.[77] The result of the benefit running is that the protection provided for a purchaser may go beyond an action for damages against his immediate vendor. Under normal practice, a purchaser of land should obtain the benefit of a chain of protection consisting of the covenants for title given by each of the previous

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74. See further M.J. Russell at (1970) 34 Conv. (N.S.) 1980-3, where the suggestion is also made that the covenants for title will not cover any implied rights carried by the conveyance; again these are not part of "the subject-matter ... expressed to be conveyed".

75. Page v. Midland Railway [1894] 1 Ch. 11; Great Western Railway Co. v. Fisher [1905] 1 Ch. 316 (and see per Stamp J. in Hissett v. Reading Roofing Co. Ltd. [1969] 1 W.L.R. 1757 at p. 1759, also M.J. Russell at (1970) 34 Conv. (N.S.) 194-6).

76. Ellis v. Rogers (1885) 29 Ch. D. 661; Timmins v. Moreland Street Co. Ltd. [1958] Ch. 110.

77. L.P.A. 1925, s. 76(6).

vendors of the land conveying "as beneficial owner". Since such vendors assume liability for the acts and omissions, inter alios, of anyone through whom they derive title otherwise than for value, the covenants for title extend to cover intermediate donors, testators and intestates (who will not have given the full, if any, covenants), stopping short only at the preceding vendor. Thus the chain is not broken by a voluntary change in title, and though each vendor gives only qualified covenants, the total should in theory amount to an absolute guarantee of title.

2.26 An absolute guarantee may be thought no more than a mirage. In the first place, the purchaser, on whom rests the burden of proof,[78] must choose the proper defendant, the particular vendor responsible. That vendor may be deceased and his estate distributed, or a man of straw in some other way. The chain may be broken by one of the previous vendors conveying otherwise than "as beneficial owner" or by the covenants being either expressly modified to exclude liability for the defect in question or else simply omitted altogether. The incumbrance or other defect in title may have been imposed by someone for whom no previous vendor was responsible.[79] However, a break in the chain of protection of this sort does not itself constitute a defect in title.[80]

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78. Stoney v. Eastbourne Rural District Council [1927] 1 Ch. 367.

79. See Wyld v. Silver [1963] 1 Q.B. 169 where a purchaser finding his land incumbered with an annual fair by virtue of an inclosure award made pursuant to a private Act of Parliament and "with no hope of remedy under his ordinary qualified covenants for title", received Russell J.'s "unqualified sympathy" but nothing more (at p. 194).

80. Re Scott and Alvarez's Contract [1895] 1 Ch. 596.

An absolute guarantee, an unbroken chain of protection, cannot in practice be relied upon.

2.27 Registered conveyancing - In the previous paragraph covenants for title have been considered almost entirely in relation to cases of unregistered conveyancing. The complications are added to by the relevant provisions of the Land Registration Act and Rules 1925 because these do not blend satisfactorily with provisions based on the unregistered system of conveyancing. Covenants for title may be implied in registered conveyancing.[81] The prescribed form of Transfer of Freehold Land[82] leaves no place for insertion of the words "as beneficial owner", but it is particularly provided that for the purpose of introducing the implied covenants a person may be expressed to transfer as beneficial owner.[83] In addition there is a provision automatically implying, when there is a transfer of a leasehold, a covenant by the transferor corresponding as to part only to that implied in unregistered conveyancing.[84]

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81. See Appendix C, s. 38(2) and rr. 76 and 77 of, respectively, the Land Registration Act and Rules 1925.

82. Form 19 of the Sched. to, and r. 98 of, the Rules.

83. By r. 76; this rule also stipulates that no reference to the implied covenants shall be entered on the register, but cp. L.R.A. 1925, s. 24(1) as to entries negativing implied covenants on leasehold transfers.

84. See L.R.A. 1925, s. 24(1)(a) in Appendix C and compare L.P.A. 1925, s. 76(1)(B) and Sched. II in Appendix B which latter depends on both beneficial ownership capacity and valuable consideration; indemnity covenants by the transferee are also implied by L.R.A. 1925, s. 24(1)(b) and (2) corresponding approximately to those implied by L.P.A. 1925, s. 77. See also L.R.A. 1925, s. 28(2) implying similar covenants into registered charges of leasehold land.

2.28 The position tends to be somewhat confused by the fact that registration of title itself has a curative effect. Statute vests the legal estate in the registered proprietor, even without any valid conveyance to him.[85] First registration with an absolute title confers a title on the proprietor which is essentially subject to anything entered on the register and overriding interests but "free from all other estates and interests whatsoever".[86] If it is not freehold but leasehold land, the proprietor will naturally also take subject to all the terms of the lease but apart from this the curative effect of registration is the same.[87] Then under the scheme of the legislation, if rectification of a registered proprietor's title should occur[88] from which he suffers loss and which is not his fault, he will be entitled to an indemnity from H.M. Land Registry.[89]

2.29 The implied covenants for title in registered conveyancing will be of obvious value if the transferor is only registered with a possessory or qualified title, since protection may be required in case of rights and interests subsisting prior to or excepted from registration.[90]

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85. See L.R.A. 1925, s. 69(1).

86. See L.R.A. 1925, s. 8; if the proprietor is a trustee he also takes subject to the beneficial interests: as to overriding interests see ibid., s. 70 and Third Report on Land Registration (1987) Law Com. No. 158.

87. See L.R.A. 1925, s. 9.

88. I.e. under L.R.A. 1925, s. 82.

89. See L.R.A. 1925, s. 83, also Ruoff and Roper, Registered Conveyancing, 5th ed., (1986) pp. 72-3 for a forceful explanation of the curative effect of first registration.

90. See L.R.A. 1925, ss. 6, 7 and 20(2) and (3).

Equally, if the transfer is registered with a good leasehold title, protection may be needed in respect of the enforcement of any right or interest adversely affecting the lessor's title.[91] Even an absolute leasehold title leaves the lease liable to forfeiture,[92] so that the extra leasehold covenants remain valuable.[93] Again they must be worth having where the transferor is only in the position of being at best entitled to be registered.[94] However, where the transferor is himself actually registered with an absolute title, the view has been expressed that the implied covenants for title perform no useful function.[95] This clearly appears a little too absolute a view. Thus Oliver L.J. quite recently referred to the argument that since every registered proprietor had statutory powers of disposition, there could be no breach of the covenant about power to convey and proceeded:[96]

> Speaking for myself, I find this argument unanswerable and it seems to me, futhermore, to accord with the scheme of the Land Registration Act

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91. L.R.A. 1925, s. 23(2).

92. See L.R.A. 1925, s. 9(a).

93. See para. 2.3.

94. I.e. reliance is being placed on L.R.A. 1925, s. 37 and L.R.R. 1925, rr. 81 and 170.

95. See Ruoff and Roper, Registered Conveyancing 4th ed., (1979) p. 270:

> ... if the operation of the covenant (power to convey with quiet enjoyment) is compared with the effect of a transfer for value of freehold land registered with an absolute title, which is as watertight as a title can be, it appears to do no more than reiterate the legal position created by registration of the transfer and it may seem to perform no unperformed or useful function.

Cp. 5th ed., (1986) p. 337 and Land Transfer Act 1897, s. 16(3) excluding covenants for title on a sale of freehold land registered with absolute title unless required by special stipulation.

96. In Meek v. Clarke (1982) C.A. unreported transcript p. 14 (emphasis added).

> which guarantees the registered proprietor's title to the land comprised in the registered entry with a right to indemnity under section 83 where there is an error or omission in the Register or the Register falls to be rectified. In such a scheme, there is very little room for the operation of a covenant for good right to convey in the case of an absolute title, for the registered entry itself imports the right to dispose of the registered estate, though the covenants for quiet enjoyment and for freedom from incumbrances may still have an operation as regards, for instance, overriding interests created since the last disposition for value.

In this case it was decided that rectification of the Register[97] so as to delete the benefit or a right of way did not constitute a breach of the covenants for title which were applied as at the date of the transfer.[98]

2.30 The view that the covenants for title perform no useful function is generally correct so far as registrable interests are concerned, since the transferee is not affected by such interests unless they are registered. Then not only will he in the usual way have notice of their existence, but also the implied covenants for title take effect as if the transfer was expressly made subject to "all charges and other interests appearing or protected on the register".[99] However, here the reference to "the register" means, not the whole register, but the separate register of

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97. I.e. under L.R.A. 1925, s. 82.

98. Slade L.J. indicated that there might have been a breach had the order for rectification operated retrospectively so as to pre-date the relevant transfer; this it might do by virtue of L.R.A. 1925, s. 83(2) but see Freer v. Unwins Ltd. [1976] Ch. 288 to the contrary.

99. L.R.A. 1925, r. 77(1)(a).

the vendor's title.[100] Accordingly the implied covenants are applicable to matters entered on other registers of title.[101] In the cited case, the transfer purported to include a strip of adjoining registered land to which the transferor-vendors had no title; they were held to be in breach of the implied covenants for title.[102] Thus the covenants for title may operate if the terms of the transfer into which they are implied do not correspond exactly with the terms of the absolute title.

2.31 Also the view that the implied covenants for title perform no useful function may be acceptable so far as concerns overriding interests of which the transferee has notice, since again the covenants take effect as if the transfer was expressly made subject to them.[103] Considerable controversy has arisen, however, so far as concerns, in this context, overriding interests of which the transferee does not have notice. The practice in registered conveyancing is for a vendor to disclose any existing overriding interests known to him, but not for these to be mentioned in the instrument of transfer. In unregistered conveyancing mere disclosure such as this would not absolve a vendor from liability under the implied covenants for title[104] but in registered conveyancing it

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100. A.J. Dunning and Sons (Shipfitters) Ltd. v. Sykes and Son (Poole) Ltd. [1987] 2 W.L.R. 167 C.A.

101. Ibid.

102. Note that they had previously had title to the adjoining strip: cp. para. 2.9.

103. L.R.R. 1925, r. 77(1)(b).

104. Page v. Midland Railway [1894] 1 Ch. 11; Great Western Railway Co. v. Fisher [1905] 1 Ch. 316. See para. 2.24.

does by virtue of rule 77(1) of the Land Registration Rules 1925, which provides that the covenants:

> take effect as though the disposition was expressly made subject to:-
>
> (b) any overriding interests of which the purchaser has notice and subject to which it would have taken effect, had the land been unregistered.

Construing this rule is not without its difficulties.[105] But the result seems clear. Thus in a case where, after completion, property was found to be still subject to a tenancy and the purchasers recovered damages for failure to give vacant possession, Stamp J. remarked:

> Alternatively, the [purchasers] claimed damages for breach of the implied covenant for quiet enjoyment and title. Had the land not been, as in fact it was, registered land, the [purchasers] could so it appears, subject to proof of the facts on which [they] rely, have succeeded in their alternative claim on the implied covenants, notwithstanding that they knew of the [tenant's] presence on the property at the time of the conveyance; but having regard to the terms of the relevant Land Registration Rules 1925 counsel for the [purchasers] felt unable to argue before me that this was fatal to the [purchasers'] claim which accordingly was not proceeded with.[106]

In view of rule 77(1)(b) therefore, the only question is the position where there are existing overriding interests not disclosed (or otherwise known) to the transferee. The

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105. What can "notice" comprehend in this registered conveyancing context? What do the words beginning "and subject to which ..." mean? Why is the comma where it is?

106. In Hissett v. Reading Roofing Co. Ltd. [1969] 1 W.L.R. 1757 at p. 1759.

simple answer has been suggested that it follows from the provision in rule 77(1)(b) itself, that all such other overriding interests must be covered by the covenants for title.[107] However, it has also been argued that a transfer of registered land is the equivalent of a conveyance of unregistered land without words of limitation.[108] The transferor transfers only what he is registered with, i.e. "the land comprised in the title above mentioned" which is necessarily subject to any overriding interests, and so there is no breach of the implied covenants for title.[109] This argument gains indirect support from the decision in Re Chowood's Registered Land[110] that no loss is caused, and so no indemnity available, when the register is rectified to give effect to an overriding interest.[111] It has nevertheless not yet been accepted by any court or all writers.[112] Accordingly a measure of uncertainty may still be perceived.

2.32 Buckley J. has expressed the opinion that "on a conveyance of registered land the same rules must apply [as to the covenants for title which in the absence of special stipulation, a vendor can be required to give] as if the

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107. Law Commission, Transfer of Land: Land Registration (Second Paper) (1971), Working Paper No. 37, para. 31(c).

108. See para. 2.23.

109. See Professor Harold Potter (1942) 58 L.Q.R. 356.

110. [1933] Ch. 574.

111. See also Re Boyle's Claim [1961] 1 W.L.R. 339.

112. Cp. Mornington Permanent Building Society v. Kenway [1953] Ch. 382; also PH and AJ Dunning Ltd. v. Sykes and Son Ltd. [1987] 2 W.L.R. 167 at pp. 176-7 (per Dillon L.J.); also P.H. Kenny at (1981) Conv. 32-7 and M.J. Russell at (1982) Conv. 145-50.

conveyance were of unregistered land, although, if the title be registered as absolute, the grantee may often not insist on any covenant for title".[113] Consequently, under an open contract, a purchaser who knows that the vendor is selling as personal representative could not require the vendor to give a covenant more onerous than that in the Law of Property Act 1925, Schedule 2, Part VI.[114]

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113. Re King [1962] 1 W.L.R. 632.

114. Thus the covenant implied by the L.R.A. 1925, s. 24(1)(a) (that, notwithstanding anything done, omitted or suffered by the transferor, the rents, covenants and conditions of the lease on his part have been paid, performed and observed) may be limited (Re King, ante; on appeal [1963] Ch. 459).

PART III

OPTIONS

A. No Change

3.1 The preceding Part of this paper must have demonstrated that the implications as to a vendor's title on a disposition of land are neither simple nor modern. On the contrary, the covenants implied into the conveyance or transfer are patently ancient and complicated as to both law and language: an elaborate edifice has been erected of no reliable utility. Any suggestion that no change should be recommended seems quite untenable. At the very least redrafting is required for the statutory covenant.[1]

B. Redraft

3.2 It would be perfectly possible to replace the nineteenth century form of statutory covenants with a twentieth century version to precisely the same effect. The covenants would be implied in other words but with no changes of substance. The result should be clearer although of little more use to purchasers than the present covenants. However, clarification itself might occasionally carry substantive implications.[2] More important, certain changes

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1. I.e. as set out in Sched. 2 to the L.P.A. 1925: see Appendix B.

2. See for example paras. 2.12 and 2.20 as to covenant (3) - freedom from incumbrances - being a separate or subordinate covenant; also para. 2.11 as to the meaning

of substance appear undeniably necessary.

C. Amend

3.3 Quite apart from the wording of the implied covenants themselves,[3] there are various aspects of the implying provision itself[4] which are or may be unacceptable. Foremost amongst these is the phrase which involves the vendor actually having his expressed capacity.[5] Better without much doubt so far as the spirit and letter of law and practice are concerned would be some such phrase as "expressly purports to convey" in whatever may be the appropriate capacity. After this aspect is the phrase which allows a vendor to escape liability simply by omitting words of limitation.[6] Better perhaps would be the use of one word such as "land" or even "property"[7] plus an indication that for these covenants nothing less than the fee simple absolute in possession free from incumbrances and with all implied rights would suffice unless the contrary were expressed.

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2. Continued
of covenant (2) - quiet enjoyment; para. 2.7 as to the significance of "otherwise than by purchase for value"; para. 2.6 as to "through" and para. 2.5, n. 12, as to "notwithstanding"; not to mention para. 2.10, n. 22, as to an accidental "omission".

3. I.e. as set out in Sched. 2 to the L.P.A. 1925: see Appendix B.

4. I.e. L.P.A. 1925, s. 76: see again Appendix B.

5. I.e. "conveys and is expressed to convey" in s. 76(1) of the L.P.A. 1925 as to which see paras. 1.5 and 2.21.

6. I.e. "subject-matter ... expressed to be conveyed" in s. 76(1) of the L.P.A. 1925 as well as throughout Sched. 2; see para. 2.23.

7. See L.P.A. 1925, s. 205(1)(ix) and (xx).

3.4 In addition, the vicarious liability impliedly assumed by husbands for wives but not by wives for husbands seems self-evidently out-dated.[8] Equally it now appears oddly old-fashioned that a voluntary settlor should impliedly assume any enforceable liabilities whatsoever.[9] Against this, if trustees or their like[10] sell land, especially if they are also the beneficiaries, why should the purchasers not impliedly enjoy the full covenants for title?[11]

3.5 Rather different is the point that the section may imply covenants into a conveyance without confining its potential operation to dispositions of land: perhaps it should be so confined.[12] More significant might be the fact that for the purposes of the section "conveyance" does not include any "lease at a rent".[13] Thus if a long lease is granted in consideration of a premium, there will be no implied covenants for title even where the landlord is expressed to be (and at present actually is) a beneficial owner if any rent, however little, happens to be reserved.

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8. See L.P.A. 1925, s. 76(3) and para. 2.17.

9. See L.P.A. 1925, s. 76(1)(E) and para. 2.18.

10. I.e. mortgagees, personal representatives, etc.

11. See L.P.A. 1925, s. 76(1)(F) and para. 2.19.

12. See para. 1.6, n. 25; compare Guyot v. Thomson [1894] 3 Ch. 388 where an exclusive licence to manufacture under a patent had been granted "as beneficial owner"; Lindley L.J. said (at p. 398):

> I do not think that this is a conveyance within the meaning of the Conveyancing Act. But it does not follow that the introduction of the words "as beneficial owner" is unimportant. Those words show that the parties did not mean to treat this as a revocable licence.

13. L.P.A. 1925, s. 76(5); see para. 2.3.

Nowadays, when land is often "sold" in this way,[14] this could perhaps be reconsidered as a matter of law if not practice.[15] Nevertheless, it should be noticed that the implication of full covenants for title on the part of a landlord would encounter a procedural obstacle at least to enforcement: as a rule, the tenant would find himself estopped from disputing his landlord's title to grant the lease.[16] However, this estoppel operates only so long as the tenant's possession remains actually undisturbed by any successful adverse claim.[17] Accordingly, only an unqualified covenant for quiet enjoyment would appear to be of any practical utility unless and until this existing estoppel aspect of the landlord and tenant relationship has been re-examined with particular reference to leases granted for a long term in consideration of a premium.[18]

3.6 On the wording of the implied covenants themselves, by far the greatest cause for complaint is that they are

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14. As to the expression "sale by way of lease" strictly constituting a contradiction in terms, see per Lord Romer in Utting & Co. Ltd. v. Hughes (1940) 43 T.C. 189 at p. 196.

15. It is understood that covenants for title on the part of landlords are rarely if ever expressly incorporated into leases, as they could be, whether by reference to the L.P.A. 1925, Sched. 2 or otherwise.

16. See Industrial Properties Ltd. v. Associated Electrical Industries Ltd. [1977] Q.B. 580 C.A. where the rule was applied despite determination of the lease so that the tenant was unable to resist liability for breach of repairing covenants.

17. See per Lord Denning M.R. at ibid. pp. 596-7 incidentally stating that, apart from ceasing to be liable to pay rent and perform covenants, "The tenant can also claim damages for the eviction if there is, as here, an express covenant for quiet enjoyment covering interruption by title paramount."

18. See T.M. Aldridge Leasehold Law, paras. 4.099 and 7.057;

qualified and not absolute.[19] Why should a mortgagee but not a purchaser enjoy the benefit of unqualified covenants for title? Why should the implications as to a vendor's good title be absolute immediately before completion but not immediately afterwards? However, if the covenants for title implied on the part of vendors were to become absolute, there might seem little if any justification for the burden to continue even in theory to run with the land.[20]

3.7 Beyond the above, there are one or two other respects in which a vendor's liability might be thought potentially excessive. First, there is the inconsistent and unpredictable starting of the limitation period for different covenants.[21] These could be standardised at, say, twelve years from the date of conveyance.[22] Second, there is the peculiarly unprincipled point that, in unregistered conveyancing, a purchaser may recover damages for breach of covenant on account of defects in title even though they were actually known to him so long as they were not mentioned in the conveyance to him.[23] This surely should be brought into line with the registered and indeed contractual pre-completion positions.

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18. Continued
also more generally Jill Martin, "Tenancies by Estoppel, Equitable Leases and Priorities" [1978] Conv. 137.

19. See as to this paras. 1.3, 1.5, 2.4, 2.5, 2.9, 2.11 and 2.13.

20. See L.P.A. 1925, s. 76(6) and paras. 2.25 and 2.26.

21. See para. 2.20.

22. Cp. para. 4.4.

23. See para. 2.24; cp. para. 2.30.

3.8 With registered conveyancing, in the light of recent cases,[24] no especial extra cause for concern can be perceived. Aside from comparatively minor irritations,[25] perhaps it ought to be put beyond argument that undisclosed overriding interests must be covered.[26] Nevertheless, essentially any redrafted covenants for title should be good enough generally for implication into registered transfers as well as into unregistered conveyances. But the future of implied covenants for title may be open to doubt.

D. Abolish

3.9 A simple solution of the statutory complexities certainly suggests itself: repeal the provisions without replacement. This should drive solicitors and other conveyancers to think again about the utility of covenants for title both generally and in individual transactions. Modern draftsmanship, favouring brevity and clarity rather than verbosity and obscurity, could then express appropriate covenants. Indeed, given the notorious difficulties and unreliability of the existing statutory covenants, it may well be thought somewhat surprising that a substitute redraft in plain English has not already been published by an enterprising editor of some collection or other of current conveyancing precedents. Then the covenants would actually be set out in a document accessible to the lay parties (who at present doubtless dismiss expressions like "as beneficial owner" as meaningless lawyer's verbiage - an

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24. See para. 2.27 et seq.

25. E.g. the confusing duplication represented by ss. 24 and 28(2) of the L.R.A. 1925 (see para. 2.27) and the difficulties in construction of r. 77(1)(b) of the L.R.R. 1925 (see para. 2.31).

26. Cp. para. 2.31.

understandable but mistaken attitude). However, conveyancing documentation would obviously become longer and this might significantly increase the cost.

3.10 Alternatively, practitioners could choose to rely solely upon the terms as to the vendor's title implied into the contract for sale: these terms could readily be preserved by a declaration against disappearance by merger into the deed of conveyance or transfer on completion.[27] Preferable in practice might be the development and adoption of an additional standard condition of sale spelling out the vendor's contractual obligations as to title. The intention that such a condition of sale should survive completion could also easily and effectively be stated.

E. Statutory Guarantee

3.11 Lastly, sales of land could be harmonised, at least as to title, with sales of goods where much simpler and apparently more satisfactory statutory provisions apply.[28] The ordinary terms about title implied into sales of goods correspond essentially to the first three of the four covenants for title implied on a sale of freehold land where the vendor conveys as beneficial owner and the fourth could always be added.[29] It appears acceptable that they apply to the contract and survive completion[30] and that they are

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27. Cp. para. 1.4.

28. Sale of Goods Act 1979, s. 12: see para. 1.2 and Appendix A.

29. See para. 2.2 - covenant (4) for further assurance is missing.

30. Cp. also paras. 1.2 and 1.4 as to whether title by the time of completion suffices.

not qualified but absolute. However, in the present context of sales of land it seems unnecessary to stipulate that any such implied terms as to title cannot be excluded or restricted.[31]

Failure of consideration

3.12 The term implied by statute on a sale of goods that the seller has a right to sell them technically constitutes a "condition".[32] Each of the other two terms (i.e. free from incumbrances and undisturbed possession) is equally technically a "warranty".[33] The remedy for breach of warranty is an action for damages.[34] Similarly a purchaser's remedy for breach of the implied covenants for title in a conveyance on sale of land has always been assumed to be not rescission but damages.[35] In contrast, where there is a breach of condition, then instead of or as well as suing for damages, the innocent party may in general treat a contract for the sale of goods as repudiated.[36] In

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31. Cp. para. 1.2, n. 7 referring to s. 6 of the Unfair Contract Terms Act 1977 (as amended in 1979) the specific provision of which is inapplicable to sales of land; ss. 2-4 and 7 of the 1977 Act do not extend to "any contract so far as it relates to the creation or transfer of an interest in land, or to the termination of such an interest, whether by extinction, merger, surrender, forfeiture or otherwise."

(Sched. 1, para. 1(b)).

32. Sale of Goods Act 1979, s. 12(1).

33. Ibid., s. 12(2).

34. Ibid., s. 53.

35. Except as to further assurance: see para. 2.14.

36. See Sale of Goods Act 1979, s. 11, particularly subs. (4) as to a breach of condition being treated as a breach of warranty after the goods have been accepted (see also ss. 34 and 35).

addition, there is a provision preserving the common law position: "Nothing in this Act affects the right of a buyer ... to recover money paid where the consideration for the payment of it has failed".[37] In the result, when a seller of goods had no right to sell, the buyer may reject them and recover in full the price that he has paid. What is more, he can do so without giving any credit at all for his use and enjoyment of the goods in the meantime.[38] This position has not escaped criticism and, indeed, this Commission has twice provisionally recommended, in effect, that the buyer should not automatically be entitled to recover all the price paid where the seller is in breach of the "right to sell" condition.[39] Nevertheless, neither our Report on Pecuniary Restitution on Breach of Contract nor our Report on Sale and Supply of Goods actually made any such recommendation.[40]

3.13 Presumably the doctrine of total failure of consideration with all its consequences should be applicable to sales of land where the vendor later turns out to have lacked any power to convey. No decision directly to this effect (or to the contrary) appears to have been reported, but there is no obvious reason for not applying basic common

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37. Ibid., s. 54.

38. See Rowland v. Divall [1923] 2 K.B. 500 C.A.; Karflex Ltd. v. Poole [1933] 2 K.B. 251 C.A.; Warman v. Southern Counties Car Finance Corporation Ltd. [1949] 2 K.B. 576; and Butterworth v. Kingsway Motors [1954] 1 W.L.R. 1286.

39. See Working Papers (1975) No. 65, paras. 57-78 and (1983) No. 85, paras 6.1-6.7; cp. also Twelfth Report of the Law Reform Committee (Transfer of Title to Chattels) (1966), Cmnd. 2958, para. 36.

40. See respectively (1983) Law Com. No. 121, paras. 1.9-1.12 and (1987) Law Com. No. 160, para. 1.11.

law principles to all restitution claims.[41] The question will then arise of whether on the facts and as a matter of law there has been a total failure of consideration, particularly where the purchaser has enjoyed occupation for a period.[42] Nevertheless, the better view may be thought to be that at present sales of goods and sales of land should be regarded as on a par.[43] In other words, where there was no right to sell or power to convey, the purchaser should be entitled to reject the goods or land and recover the price paid in full instead of or as well as seeking damages. Naturally some may have sympathy for the view that the common law ought to be changed in this respect by statute so that a purchaser could never recover more than he actually lost, i.e. credit should be given for possession before rescission. However, such a change would have to deal convincingly with, for instance, the following points:[44]

(a) Is a dishonest seller (e.g. one who knew that he had no proper title but concealed that

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41. Wright v. Colls (1849) 8 C.B. 150 supports this proposition.

42. Cp. Hunt v. Silk (1804) 4 East. 449, not concerning any lack of title, where a lessee who had had intermediate possession of the premises was precluded from rescinding; distinguished in Rowland v. Divall [1923] 2 K.B. 500 per Bankes L.J. at p. 504 on the apparent ground that there had been part-performance of the agreement for a lease. See also Wright v. Colls supra where Hunt v. Silk was cited but not followed as to an agreement for a lease.

43. See R. Goff & G. Jones, Law of Restitution 3rd ed., (1986) pp. 461-2.

44. See Exemption Clauses in Contracts (1969) Law Com. No. 24, para. 15 as appropriately amended from reference to goods.

fact) to be treated on an equal footing with a seller in good faith?[45]

(b) Should a seller, or at least a seller in good faith, be given an opportunity to perfect his defective title before the buyer can proceed to rescind the contract?[46]

(c) How is the financial value of the "benefit" derived by the buyer from the possession of [land] to be calculated? In particular, should account be taken of the appreciation or depreciation of the value of the [land] while in the buyer's possession?

(d) How is the benefit to be apportioned where the [land has] passed through the hands of a chain of buyers?

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45. This question only concerns the position in restitution. The answer may already be provided by public policy precluding any aid to a dishonest seller: see Pecuniary Restitution on Breach of Contract (1975) Working Paper No. 65, para. 71. Further, the innocent purchaser may also or alternatively pursue various other remedies, e.g. under L.P.A. 1925, s. 183(2) as to fraudulent concealment of documents and falsification of pedigree; cp. Misrepresentation Act 1967, ss. 1 and 2 as to rescission and damages for innocent misrepresentation despite completion (see Watts v. Spence [1976] Ch. 165, where a vendor of land had no right or power to convey and also Hizzett v. Hargreaves 28 April 1986 C.A. unreported where damages were recovered for a negligent mis-statement as to title).

46. Cp. Butterworth v. Kingsway Motors Ltd. [1954] 1 W.L.R. 1286 (sale of car, the subject of a hire-purchase agreement) where a week after the buyer had rescinded the contract, the defect in the original title was cured, but it was held that as soon as the buyer had given notice of rescission he had a vested right to the return of his money and nothing done by the seller afterwards could deprive the buyer of this right.

These practical problems, concerning remedies rather than any implied term as to title itself, seem virtually insoluble, at least as part of this exercise and no need is now perceived to make even tentative recommendations about the legal consequences of a total failure of consideration on a sale of land.

PART IV

CONCLUSION

4.1 No remotely persuasive case against doing something to clear away the virtually valueless obscurities of the present implied covenants for title appears possible. Of the positive options outlined in the preceding Part, our tentative preference is for the last. In other words, we would as at present advised prefer to replace the existing statutory provisions[1] with a fairly short section similar to that applying to sale of goods. In substance this would reasonably simply imply a term into a contract for the sale of land[2] that:

(a) the vendor has a right (or power) to sell the land (or will have by completion);

(b) the land is (or will be by completion) free from undisclosed or unknown charges, incumbrances or other defects in title;

(c) the purchaser will have quiet enjoyment of the land; and

(d) the vendor will co-operate if requested in perfecting the purchaser's title.

In addition, if the land is leasehold, it should be implied that:

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1. I.e. L.P.A. 1925, s. 76 and Sched. 2: see Appendix B.

2. Including the grant of a lease for a premium, with or without a rent.

(e) the lease is still valid; and

(f) there has been no breach of covenant.[3]

This implied term (i.e. (a) to (d) plus (e) and (f) when relevant) would not be qualified in any way and would survive completion but it would give way to the expression of a contrary intention as well as to the purchaser's contrary knowledge. In particular, it would remain open to conveyancers to extend or restrict this implication as appropriate to individual transactions.

4.2 This proposal of an implied term does depend upon there being a contract for the sale or other disposition of land,[4] i.e. into which to imply the term. When the transaction is not preceded by any contract, e.g. most mortgages and many leases, not only would the implied term be inapplicable but, as at present, there would be no contractual entitlement to any covenants for title. However, appropriate covenants could certainly be expressed in the document effecting the transaction, i.e. the mortgage or the lease, as a consequence of relevant negotiations. In practice, we anticipate, mortgagees will tend to insist and landlords to refuse.[5]

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3. Cp. para. 2.3.

4. See L.P.A. 1925, s. 40(1).

5. But see Land Mortgages (1986), Working Paper No. 99, para. 5.37, for a suggestion that certain terms should be implied into all mortgages, and that these should include standard covenants for title.

4.3 Since a contract will necessarily be involved, there must also as a rule necessarily be sufficient consideration for the transaction. However, the consideration supporting a contract need not be adequate, valuable or monetary, and there may be none at all if the contract itself is made by deed. None of this seems to matter: as already indicated, the implied term may be excluded if wished. Where there is no contract and no consideration, as with a gift or voluntary settlement of land, there seems no justification for the implied term or indeed any implied covenants for title: in principle, no one should be expected to look a gift horse in the mouth. However, donors and settlors could, of course, always covenant expressly as to their titles in such terms as they wish.

Limitation periods

4.4 Whichever solution is eventually selected, attention must be turned to the issue of limitation periods.[6] If the vendor's liability is simply contractual, as we tentatively prefer, the time limit for an action will usually be six years from breach.[7] Yet this period might be thought too short for present purposes bearing in mind that the basic time limit in relation to land (as well as deeds) is twelve years.[8] Ordinarily, of course, undisturbed possession by a purchaser of land for that longer period will itself extinguish any defects in title. Against this, registration of title, soon to be compulsory

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6. See para. 2.20.

7. See Limitation Act 1980, s. 5, also ss. 28-32 as to extensions in cases of disability, acknowledgment, fraud, concealment and mistake.

8. See ibid., ss. 8 and 15-20.

everywhere, will almost immediately cure almost all bad titles.[9] First registration should be applied for within two months of completion of a sale[10] and in practice every application for registration of a transfer on sale should be made within a thirty day priority period.[11] Thus defects will generally be discovered and actions commenced, in the absence of a cured title, well within even the shorter limitation period. On a later rectification of a cured title, indemnity ought to be sought from the Land Registry instead of relying on any covenants for title.[12] However, the Chief Land Registrar may well wish to rely on such covenants[13] and in any case the curative effect of registration even with an absolute title will not protect purchasers from everything. Thus it will not extend to a lease liable to forfeiture nor, more important perhaps, to overriding interests.[14] Accordingly, on balance, we incline to the view that the liability under any covenant or term implied as to title of a vendor of land should last twelve years from completion but no longer.[15]

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9. See para. 2.28.

10. L.R.A. 1925, s. 123.

11. See Land Registration (Official Searches) Rules 1986.

12. See L.R.A. 1925, s. 83; also Meek v. Clark (1977) C.A. unreported, and para. 2.28.

13. See L.R.A. 1925, s. 83(10).

14. But note Law Com. No. 158 recommending the extension of indemnity to cover these interests.

15. Compare paras. 2.20 and 3.7 as to standardising the present different periods of potential liability.

APPENDICES

CONTENTS

APPENDIX A

Sale of Goods Act 1979

S.12

APPENDIX B

Law of Property Act 1925

S.76

Schedule 2

APPENDIX C

Land Registration Act 1925

S. 24

S. 38(2)

S. 69

Land Registration Rules 1925

S. 76

S. 77

Appendix A

Sale of Goods Act 1979

Implied terms about title, etc.

12.—(1) In a contract of sale, other than one to which subsection (3) below applies, there is an implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and in the case of an agreement to sell he will have such a right at the time when the property is to pass.

(2) In a contract of sale, other than one to which subsection (3) below applies, there is also an implied warranty that-

(a) the goods are free, and will remain free until the time when the property is to pass, from any charge or encumbrance not disclosed or known to the buyer before the contract is made, and

(b) the buyer will enjoy quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known.

(3) This subsection applies to a contract of sale in the case of which there appears from the contract or is to be inferred from its circumstances an intention that the seller should transfer only such title as he or a third person may have.

(4) In a contract to which subsection (3) above applies there is an implied warranty that all charges or encumbrances known to the seller and not known to the buyer have been disclosed to the buyer before the contract is made.

(5) In a contract to which subsection (3) above applies there is also an implied warranty that none of the following will disturb the buyer's quiet possession of the goods, namely-

(a) the seller;

(b) in a case where the parties to the contract intend that the seller should transfer only such title as a third person may have, that person;

(c) anyone claiming through or under the seller or that third person otherwise than under a charge or encumbrance disclosed or known to the buyer before the contract is made.

(6) Paragraph 3 of Schedule 1 below applies in relation to a contract made before 18 May 1973.

Appendix B

Law of Property Act 1925

Covenants

76. Covenants for title

(1) In a conveyance there shall, in the several cases in this section mentioned be deemed to be included, and there shall in those several cases, by virtue of this Act, be implied, a covenant to the effect in this section stated, by the person or by each person who conveys, as far as regards the subject-matter or share of subject-matter expressed to be conveyed by him, with the person, if one, to whom the conveyance is made, or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is (when the law permits) made as tenants in common, that is to say:

(A) In a conveyance for valuable consideration, other than a mortgage, a covenant by a person who conveys and is expressed to convey as beneficial owner in the terms set out in Part I of the Section Schedule to this Act;

(B) In a conveyance of leasehold property for valuable consideration, other than a mortgage, a further covenant by a person who conveys and is expressed to convey as beneficial owner in the terms set out in Part II of the Second Schedule to this Act;

(C) In a conveyance by way of mortgage (including a charge) a covenant by a person who conveys or charges and is expressed to convey or charge as beneficial owner in the terms set out in Part III of the Second Schedule to this Act;

(D) In a conveyance by way of mortgage (including a charge) of freehold property subject to a rent or of leasehold property, a further covenant by a person who conveys or charges and is expressed to convey or charge as beneficial owner in the terms set out in Part IV of the Second Schedule to this Act;

(E) In a conveyance by way of settlement, a covenant by a person who conveys and is expressed to convey as settlor in the terms set out in Part V of the Second Schedule to this Act;

(F) In any conveyance, a covenant by every person who conveys and is expressed to convey as trustee or mortgagee, or as personal representative of a deceased person, ..or under an order of the court, in the terms set out in Part VI of the Second Schedule to this Act, which covenant shall be deemed to extend to every such person's own acts only, and may be implied in an assent by a

personal representative in like manner as in a conveyance by deed.

(2) Where in a conveyance it is expressed that by direction of a person expressed to direct as beneficial owner another person conveys, then, for the purposes of this section, the person giving the direction, whether he conveys and is expressed to convey as beneficial owner or not shall be deemed to convey and to be expressed to convey as beneficial owner the subject-matter so conveyed by his direction; and a covenant on his part shall be implied accordingly.

(3) Where a wife conveys and is expressed to convey as beneficial owner, and the husband also conveys and is expressed to convey as beneficial owner, then, for the purposes of this section, the wife shall be deemed to convey and to be expressed to convey by direction of the husband, as beneficial owner; and, in addition to the covenant implied on the part of the wife, there shall also be implied, first, a covenant on the part of the husband as the person giving that direction, and secondly, a covenant on the part of the husband in the same terms as the covenant implied on the part of the wife.

(4) Where in a conveyance a person conveying is not expressed to convey as beneficial owner, or as settlor, or as trustee, or as mortgagee, or as personal representative of a deceased person. ... or under an order of the court, or by direction of a person as beneficial owner, no covenant on the part of the person conveying shall be, by virtue of this section, implied in the conveyance.

(5) In this section a conveyance does not include a demise by way of lease at a rent, but does include a charge and "convey" has a corresponding meaning.

(6) The benefit of a covenant implied as aforesaid shall be annexed and incident to, and shall go with, the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is, for the whole or any part thereof, from time to time vested.

(7) A covenant implied as aforesaid may be varied or extended by a deed or an assent, and, as so varied or extended, shall, as far as may be, operate in the like manner, and with all the like incidents, effects, and consequences, as if such variations or extensions were directed in this section to be implied.

(8) This section applies to conveyances made after the thirty-first day of December, eighteen hundred an eighty-one, but only to assents by a personal representative made after the commencement of this Act.

NOTE

Sub-ss(1),(4): words omitted repealed by the Mental Health Act 1959, s.149(2), Sch. 8, Part I.

Sections 76, 77

SCHEDULE 2

IMPLIED COVENANTS

PART I

COVENANT IMPLIED IN A CONVEYANCE FOR VALUABLE CONSIDERATION, OTHER THAN A MORTGAGE, BY A PERSON WHO CONVEYS AND IS EXPRESSED TO CONVEY AS BENEFICIAL OWNER

That, notwithstanding anything by the person who so conveys or any one through whom he derives title otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the person who so conveys has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to and be conveyed, subject as, if so expressed, and in the manner in which, it is expressed to be conveyed, and that, notwithstanding anything as aforesaid, that subject-matter shall remain to and be quietly entered upon, received, and held, occupied, enjoyed, and taken by the person to whom the conveyance is expressed to be made, and any person deriving title under him, and the benefit thereof shall be received and taken accordingly, without any lawful interruption or disturbance by the person who so conveys or any person conveying by his direction, or rightfully claiming or to claim by, through, under, or in trust for the person who so conveys or any person conveying by his direction, or by, through, or under any one (not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made), through whom the person who so conveys, derives title, otherwise than by purchase for value:

And that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all such estates, incumbrances, claims, and demands, other than those subject to which the conveyance is expressly made, as, either before or after the date of the conveyance, have been or shall be made, occasioned, or suffered by that person or by any person conveying by his direction, or by any person rightfully claiming by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by his direction, by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value:

And further, that the person who so conveys, and any person conveying by his direction, and every other person having or rightfully claiming any estate or interest in the subject-matter or conveyance, other than an estate or interest subject whereto the conveyance is expressly made, by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by

his direction, or by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value, will, from time to time and at all times after the date of the conveyance, on the request and at the cost of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the person to whom the conveyance is made, and to those deriving title under him, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required.

In the above covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage.

PART II

FURTHER COVENANT IMPLIED IN A CONVEYANCE OF LEASEHOLD PROPERTY FOR VALUABLE CONSIDERATION, OTHER THAN A MORTGAGE, BY A PERSON WHO CONVEYS AND IS EXPRESSED TO CONVEY AS BENEFICIAL OWNER

That, notwithstanding anything by the person who so conveys, or any one through whom he derives title, otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the lease or grant creating the term or estate for which the land is conveyed is, at the time of conveyance, a good, valid, and effectual lease or grant of the property conveyed, and is in full force, unforfeited, unsurrendered, and has in nowise become void or voidable, and that, notwithstanding anything as aforesaid, all the rents reserved by, and all the covenants, conditions, and agreements contained in the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance.

In the above covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage.

PART III

COVENANT IMPLIED IN A CONVEYANCE BY WAY OF MORTGAGE BY A PERSON WHO CONVEYS AND IS EXPRESSED TO CONVEY AS BENEFICIAL OWNER

That the person who so conveys, has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed by him, subject as, if so expressed, and in the manner in which it is expressed to be conveyed.

And also that, if default is made in payment of the money intended to be secured by the conveyance, or any interest

Sch. 2
Part III

thereon, or any part of that money or interest, contrary to any provision in the conveyance, it shall be lawful for the person to whom the conveyance is expressed to be made, and the persons deriving title under him, to enter into and upon, or receive, and thenceforth quietly hold, occupy, and enjoy or take and have, the subject-matter expressed to be conveyed, or any part thereof, without any lawful interruption or disturbance by the person who so conveys, or any person conveying by his direction, or any other person (not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made):

And that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all estates, incumbrances, claims, and demands whatever, other than those subject whereto the conveyance is expressly made:

And further, that the person who so conveys and every person conveying by his direction, and every person deriving title under any of them, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, or any part thereof, other than an estate or interest subject whereto the conveyance is expressly made, will from time to time and at all times, on the request of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, but as long as any right of redemption exists under the conveyance, at the cost of the person so conveying, or of those deriving title under him, and afterwards at the cost of the person making the request, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of conveyance and every part thereof to the person to whom the conveyance is made, and to those deriving title under him, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required.

The above covenant in the case of a charge shall have effect as if for references to "conveys", "conveyed" and "conveyance" there were substituted respectively references to "charges", "charged" and "charge".

PART IV

COVENANT IMPLIED IN A CONVEYANCE BY WAY OF MORTGAGE OF FREEHOLD PROPERTY SUBJECT TO A RENT OR OF LEASEHOLD PROPERTY BY A PERSON WHO CONVEYS AND IS EXPRESSED TO CONVEY AS BENEFICIAL OWNER

That the lease or grant creating the term or estate for which the land is held is, at the time of conveyance a good, valid, and effectual lease or grant of the land conveyed and is in full force, unforteited, and unssurrendered and has in nowise become void or voidable, and that all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under

him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance:

And also that the person so conveying, or the persons deriving title under him, will at all times, as long as any money remains owing on the security of the conveyance, pay, observe, and perform, or cause to be paid, observed, and performed all the rents reserved by, and all the convenants conditions and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, and will keep the person to whom the conveyance is made, and those deriving title under him, indemnified against all actions, proceedings, costs, charges, damages, claims and demands, if any, to be incurred or sustained by him or them by reason of the non-payment of such rent or the non-observance of non-performance of such covenants, conditions, and agreements, or any of them.

The above convenant in the case of a charge shall effect as if for references to "conveys", "conveyed" and "conveyance" there were substituted respectively references to "charges", "charged" and "charge".

PART V

COVENANT IMPLIED IN A CONVEYANCE BY WAY OF SETTLEMENT, BY A PERSON WHO CONVEYS AND IS EXPRESSED TO CONVEY AS SETTLOR

That the person so conveying, and every person deriving title under him by deed or act or operation of law in his lifetime subsequent to that conveyance, or by testamentary disposition or devolution in law, on his death, will, from time to time, and at all times, after the date of that conveyance, at the request and cost of any person deriving title thereunder, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the persons to whom the conveyance is made and those deriving title under them, as by them or any of them shall be reasonably required, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made.

PART VI

COVENANT IMPLIED IN ANY CONVEYANCE, BY EVERY PERSON WHO CONVEYS AND IS EXPRESSED TO CONVEY AS TRUSTEE OR MORTGAGEE, OR AS PERSONAL REPRESENTATIVE OF A DECEASED PERSON, ... OR UNDER AN ORDER OF THE COURT

That the person so conveying has not executed or done, or knowingly suffered, or been party or privy to, any deed or things, whereby or by means whereof the subject-matter of the conveyance, or any part thereof, is or may be impeached, charged, affected, or incumbered in title, estate, or otherwise, or whereby or by means whereof the person

Sch. 2
Part VI

who so conveys is in anywise hindered from conveying the subject-matter of the conveyance, or any part thereof, in the manner in which it is expressed to be conveyed.

The foregoing covenant may be implied in an assent in like manner as in a conveyance by deed.

NOTES

Words omitted from heading repealed by the Mental Health Act 1959, s.149(2), Sch 8, Part I

Appendix C

Land Registration Act 1925

24. Implied covenants on transfers of leaseholds

(1) On the transfer, otherwise than by way of underlease, of any leasehold interest in land under this Act, unless there be an entry on the register negativing such implication, there shall be implied-

(a) on the part of the transferor, a covenant with the transferee that, notwithstanding anything by such transferor done, omitted, or knowingly suffered, the rent, covenants, and conditions reserved and contained by and in the registered lease, and on the part of the lessee to be paid, performed, and observed, have been so paid, performed, and observed up to the date of the transfer; and

(b) on the part of the transferee, a covenant with the transferor, that during the residue of the term the transferee and the persons deriving title under him will pay, perform, and observe the rent, covenants, and conditions by and in the registered lease reserved and contained, and on the part of the lessee to be paid, performed, and observed, and will keep the transferor and the persons deriving title under him indemnified against all actions, expenses, and claims on account of the non-payment of the said rent or any part thereof, or the breach of the said covenants or conditions, or any of them.

(2) On a transfer of part of the land held under a lease, the covenant implied on the part of the transferee by this section shall be limited to the payment of the apportioned rent, if any, and the performance and observance of the covenants by the lessee and conditions in the registered lease so far only as they affect the part transferred. Where the transferor remains owner of part of the land comprised in the lease, there shall also be implied on his part, as respects the part retained, a covenant with the transferee similar to that implied on the part of the transferee under this subsection.

38. Certain provisions of the Law of Property Act to apply

(2) Rules may be made for prescribing the effect of covenants implied by virtue of the Law of Property Act 1925 in dispositions of registered land.

PART VI

GENERAL PROVISIONS AS TO REGISTRATION AND THE EFFECT THEREOF

69. Effect of registration on the legal estate

(1) The properietor of land (whether he was registered before or after the commencement of this Act) shall be deemed to have vested in him without any conveyance, where the registered land is freehold, the legal estate in fee simple in possession, and where the registered land is leasehold the legal term created by the registered lease, but subject to the overriding interests, if any, including any mortgage term or charge by way of legal mortgage created by or under the Law of Property Act 1925, or this Act or otherwise which has priority to the registered estate.

(2) Where any legal estate or term left outstanding at the date of first registration (whether before or after the commencement of this Act), or disposed of or created under section forty-nine of the Land Transfer Act 1875, before the commencement of this Act, becomes satisfied, or the proprietor of the land becomes entitled to require the same to be vested in or surrendered to him, and the entry, if any, for protecting the same on the register has been cancelled, the same shall thereupon, without any conveyance, vest in the proprietor of the land, as if the same had been conveyed or surrendered to him as the case may be.

(3) If and when any person is registered as first proprietor of land in a compulsory area after the commencement of this Act, the provision of the Law of Property Act 1925, for getting in legal estates shall apply to any legal estate in the land which was expressed to be conveyed or created in favour of a purchaser or lessee before the commencement of this Act but which failed to pass or to be created by reason of the omission of such purchaser or lessee to be registered as proprietor of the land under the Land Transfer Acts 1875 and 1897, and shall operate to vest that legal estate in the person so registered as proprietor on his registration, but subject to any mortgage term or charge by way of legal mortgage having priority thereto.

(4) The estate of the time being vested in the proprietor shall only be capable of being disposed of or dealt with by him in manner authorised by this Act.

(5) Nothing in this section operates to render valid a lease registered with possessory or good leasehold title.

76. Implied covenants

For the purpose of introducing the covenants implied under Sections 76 and 77 of the Law of Property Act 1925, a person may, in a registered disposition, be expressed to execute, transfer, or charge as beneficial owner, as settlor, as trustee, as mortgagee, as personal representative of a deceased person, as committee of a lunatice, or as receiver of a defective, or under an order of the court: and an instrument of transfer or charge, and any instrument affecting registered land, or a registered charge, may be expressed accordingly, but no reference to covenants implied under Section 76 aforesaid shall be entered in the register.

77. Special provisions as to implied covenants

Pursuant to Subsection (2) of Section 38 of the Act, it is hereby provided that-

(1) Any covenant implied by virtue of Section 76 of the Law of Property Act 1925 in a disposition of registered land shall take effect as though the disposition was expressly made subject to-

(a) all charges and other interests appearing or protected on the register at the time of the execution of the disposition and affecting the title of the covenantor;

(b) any overriding interests of which the purchaser has notice and subject to which it would have taken effect, had the land been unregistered; and

(2) The benefit of any covenant implied under Sections 76 and 77 aforesaid, or either of them shall, on and after the registration of the disposition in which it is implied, be annexed and incident to and shall go with the registered proprietorship of the interest for the benefit of which it is given and shall be capable of being enforced by the proprietor for the time being thereof.

(3) The provisions of this rule are in addition to and not in substitution for the other provisions relating to covenants contained in the said Act.

(4) Provided that were covenants are to be implied under Section 77 aforesaid, with or without modification, express reference shall be made in the disposition to that section or to the Parts of the 2nd Schedule to that Act in which the covenants are set out.

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